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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re: ) Case No. 11-35381-D-7  
MARK CAMERON SCOTT, )  
Debtor. )

ZURICH AMERICAN INSURANCE ) Adv. Pro. No. 11-2656-D  
COMPANY, et al., )  
Plaintiffs, )  
v. )  
MARK CAMERON SCOTT, )  
Defendant. )

In re: ) Case No. 11-36226-D-7  
ROBERT GRAY SCOTT and )  
TERESA SCOTT, )  
Debtors. )

ZURICH AMERICAN INSURANCE ) Adv. Pro. No. 11-2662-D  
COMPANY, et al., )  
Plaintiffs, )  
v. )  
ROBERT GRAY SCOTT, )  
Defendant. )

This memorandum decision is not approved for publication and may  
not be cited except when relevant under the doctrine of law of  
the case or the rules of claim preclusion or issue preclusion.

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**MEMORANDUM DECISION**

On or about January 8, 2013, plaintiffs Zurich American Insurance Company, et al. (collectively "Zurich"), submitted a proposed judgment on the court's order granting Zurich's motion for summary judgment in part (the "proposed judgment"). On January 10, 2013, defendants Mark C. Scott and Robert Gray Scott (the "defendants") filed an Objection to Proposed Judgment and Request for Hearing (the "Objection"), contending (1) that the defendants' pending appeal has divested this court of jurisdiction to enter the proposed judgment; (2) that Zurich is not entitled to pre-judgment interest; and (3) that the date for the accrual of pre-judgment interest, as stated in the proposed judgment, is arbitrary and without basis in the evidence. On January 16, 2013, Zurich filed opposition to the Objection. Having considered all of these, the court will sustain the Objection in part and enter a revised judgment. The court declines both parties' requests for a further briefing schedule and hearing.

**I. JURISDICTION TO ENTER THE JUDGMENT**

The defendants base their jurisdiction argument on the rule that "the filing of a notice of appeal from the final judgment of a trial court divests the trial court of jurisdiction and confers jurisdiction upon the appellate court." In re Transtexas Gas Corp. v. TransTexas Gas, 303 F.3d 571, 578-79 (5th Cir. 2002). However, in this case, the order the defendants have appealed from is not a final order, and thus, the rule does not apply.

On November 15, 2012, this court entered the following minute order on Zurich's motion for summary judgment:

1 IT IS ORDERED that the motion is granted in part, and  
2 judgment will be entered in favor of the plaintiff and  
3 against the defendants, jointly and severally, in the  
4 amount of \$898,402.94, which judgment will be  
nondischargeable pursuant to 11 U.S.C. § 523(a)(4).  
Counsel for the plaintiff shall submit a judgment  
consistent with the court's ruling.

5 The minute order is clearly not a final order, as it merely  
6 announced that judgment would be entered in Zurich's favor, and  
7 announced the terms on which judgment would be entered. The  
8 minute order expressly contemplated that a judgment would be  
9 submitted by Zurich's counsel. Nevertheless, on November 28,  
10 2012, the defendants filed a notice of appeal from "the judgment,  
11 order, or decree of the bankruptcy judge granting in part  
12 Plaintiff's motion for summary judgment . . . ." The notice of  
13 appeal was filed before Zurich's counsel had submitted a proposed  
14 judgment, as called for by the minute order, and before the court  
15 had entered a judgment.

16 In these circumstances, Fed. R. Bankr. P. 8002(a) has come  
17 into play, which provides that "[a] notice of appeal filed after  
18 the announcement of a decision or order but before entry of the  
19 judgment, order, or decree shall be treated as filed after such  
20 entry and on the day thereof." The rule that the filing of a  
21 notice of appeal from a final order or judgment divests the trial  
22 court of jurisdiction is not in play here, because this court has  
23 not entered a final order or judgment.

## 24 II. RIGHT TO PRE-JUDGMENT INTEREST

25 Next, the defendants contend the damages in this case were  
26 not certain or capable of being made certain by calculation, and  
27 thus, that Zurich is not entitled to the pre-judgment interest it  
28 has included in the proposed judgment. Zurich, on the other

1 hand, contends it is entitled to such interest pursuant to Cal.  
2 Civ. Code § 3287(a), which provides:

3 Every person who is entitled to recover damages  
4 certain, or capable of being made certain by  
5 calculation, and the right to recover which is vested  
6 in him upon a particular day, is entitled also to  
7 recover interest thereon from that day, except during  
8 such time as the debtor is prevented by law, or by the  
9 act of the creditor from paying the debt.

10 This provision is intended to compensate the plaintiff for  
11 loss of use of the funds awarded by the judgment during the pre-  
12 judgment period. Howard v. American National Fire Ins. Co., 187  
13 Cal. App. 4th 498, 535 (2010), citing Lakin v. Watkins Associated  
14 Industries, 6 Cal. 4th 644, 663 (1993). "Courts generally apply  
15 a liberal construction in determining whether a claim is certain,  
16 or liquidated. The test for determining certainty under section  
17 3287(a) is whether the defendant knew the amount of damages owed  
18 to the claimant or could have computed that amount from  
19 reasonably available information." Howard, 187 Cal. App. 4th at  
20 535, citing Chesapeake Industries, Inc. v. Togova Enterprises,  
21 Inc., 149 Cal. App. 3d 901, 907 (1983).

22 That a defendant disputes liability on the claim does not  
23 defeat the plaintiff's right to pre-judgment interest. Howard,  
24 187 Cal. App. 4th at 535, citing Boehm & Associates v. Workers'  
25 Comp. Appeals Bd., 76 Cal. App. 4th 513, 517 (1999). "Moreover,  
26 only the claimant's damages themselves must be certain. Damages  
27 are not made uncertain by the existence of unliquidated  
28 counterclaims or offsets interposed by the defendant." Howard,  
187 Cal. App. 4th at 536, citing Chesapeake Industries, 149 Cal.  
App. 3d at 907.

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1       The test for determining the certainty of damages was  
2 illuminated in Esgro Cent., Inc. v. General Ins. Co., 20 Cal.  
3 App. 3d 1054 (1971), in which the trial court had denied pre-  
4 judgment interest on damages awarded under a fire insurance  
5 policy and a business interruption insurance policy. On appeal,  
6 the court reversed as to the damages under the fire insurance  
7 policy, finding that the parties' disputes as to the value of the  
8 property destroyed (and hence, the plaintiff's damages) were  
9 minor. Id. at 1061. On the other hand, the court affirmed the  
10 denial of interest on the damages under the business interruption  
11 policy, because the computation of those damages required "a  
12 judicial determination to be made from conflicting evidence."  
13 Id. at 1063.

14       The extent of business interruption loss depended upon  
15 a projection of appellants' earnings based upon past  
16 experience, a fact that may or may not have been  
17 determinable from past data, and upon a determination  
18 of the permissible duration of the interruption of  
19 business, a fact which most certainly was not readily  
20 determinable on the facts here present. The jury, on  
21 conflicting evidence, was required to ascertain what  
22 period of interruption was appropriate in view of two  
23 factors: the obligation of due diligence imposed by  
24 the policy upon appellants; and the provisions of the  
25 policy excusing appellants from the effects of unduly  
26 prolonged business interruption caused by others  
27 interested in the building over whom they had no  
28 control.

22 Id.

23       In General Ins. Co. v. Commerce Hyatt House, 5 Cal. App. 3d  
24 460 (1970), the court affirmed an award of pre-judgment interest  
25 on amounts due to a building contractor for extra work, from the  
26 date the contractor provided an itemized accounting to the  
27 defendant, 5 Cal. App. 3d at 473-75, where "the only substantial  
28 matter in dispute was the amount to which [the defendants] were

1 entitled by way of setoff." Id. at 475. However, in Conderback,  
2 Inc. v. Standard Oil Co., 239 Cal. App. 2d 664, 690-91 (1966),  
3 pre-judgment interest was denied where there was "no single  
4 contractual document in which the sum due or the means of  
5 calculating it [were] clearly provided for. Indeed, according to  
6 plaintiff's theory, compensation [was] predicated on an 'open  
7 ended' purchase order involving application of a pricing formula  
8 and negotiations between the parties, all in accordance with a  
9 prior course of dealing." And in Block v. Laboratory Procedures,  
10 Inc., 8 Cal. App. 3d 1042, 1046 (1970), the court denied pre-  
11 judgment interest because, although the calculation of damages  
12 depended on the market value of a company's stock, there was no  
13 evidence of an established market for that stock.

14       The computation of damages in this case was essentially a  
15 mathematical exercise, not requiring factual findings on  
16 subjective questions like projections of lost earnings, pricing  
17 formulas, or market value of a company's shares. Thus, in the  
18 court's view, the amount of Zurich's damages was calculable from  
19 reasonably available information.

20       The defendants' argument is that "the damages figure of  
21 \$898,402.94 was determined only after conflicting evidence was  
22 reviewed by the court and the court chose a figure which both  
23 parties disagreed with." Objection, 4:24-26. In fact, that  
24 figure, down to the penny, comes from a letter written by the  
25 defendants' counsel to Zurich's counsel in which he stated that  
26 "Trans Cal [the defendants' company] has recomputed their balance  
27 due according to the figures submitted with your recent letter.  
28 Their calculations show a balance due in the amount of

1 \$898,402.94 which they will agree is the debt owed to Zurich."  
2 Appendix of Exhibits in Support of Plaintiffs' Motion for Summary  
3 Judgment, filed Aug. 1, 2012, Ex. A, p. 56.

4 The court acknowledges that the defendants withdrew that  
5 figure at some point during the two and one-half years after the  
6 letter was written and before the court heard Zurich's motion for  
7 summary judgment, and also acknowledges that "a theme of the  
8 court's [ruling] was the uncertainty as to the damages figure."  
9 Objection, 5:2-3.

10 What the court's ruling made clear and the defendants  
11 overlook, however, is that the uncertainty as to the amount of  
12 the damages was caused by the defendants, who failed to offer any  
13 figure of their own as the amount due, despite the fact that  
14 Zurich's claim was for insurance premiums collected by the  
15 defendants and withheld from Zurich. The defendants failed to  
16 offer any documentation of their own until after the evidentiary  
17 record on Zurich's summary judgment motion had closed, when the  
18 defendants suddenly came up with copies of the front sides of  
19 some 200 checks. They offered those copies with the conclusory  
20 statement that the amounts of the checks should be credited  
21 against any balance due Zurich, but with no admissible evidence  
22 as to whether the checks had actually been negotiated or how they  
23 tied in with the debt to Zurich. Further, short of accepting the  
24 defendants' unsupported conclusion, there was no way for the  
25 court to determine that those amounts had not already been  
26 accounted for in the accounting produced by Zurich.

27 Although the defendants persisted in claiming that Zurich  
28 would have the most complete records, and that Zurich had failed

1 to turn over those records to the defendants, the defendants made  
2 no attempt to obtain those records through discovery. Further,  
3 they never denied that they themselves had records from which the  
4 amount of the claim might be ascertained; that they in fact had  
5 such records seems clear from their belated production of the 200  
6 checks. In short, the court has no reason to believe the  
7 defendants did not know and could not have determined, from  
8 reasonably available information, the precise amount due Zurich  
9 on account of insurance premiums the defendants collected and  
10 failed to turn over. That they failed to make any attempt to  
11 ascertain that amount, either from their own records or from  
12 Zurich's, for more than two and one-half years should not accrue  
13 in their favor.

14 III. ACCRUAL DATE FOR PRE-JUDGMENT INTEREST

15 Finally, the defendants contend the date used by Zurich in  
16 the proposed judgment, January 1, 2010, as the accrual date for  
17 pre-judgment interest is arbitrary and without foundation in the  
18 evidence. Zurich has not addressed this issue in its opposition.

19 It is not disputed that the parties terminated their  
20 business relationship effective December 31, 2009. On March 5,  
21 2010, Zurich provided an accounting to the defendants' attorney  
22 of the amounts Zurich claimed were due. On March 15, 2010, the  
23 defendants' attorney wrote the letter described above in which he  
24 stated that Trans Cal had recomputed the figures and come up with  
25 a balance due of \$898,402.94. Although the defendants later  
26 asserted they were entitled to various setoffs and credits  
27 against that amount, they never demonstrated by admissible  
28 evidence the amounts of those setoffs and credits, and failed to



1 seek additional records from Zurich by way of discovery. The  
2 court finds that March 15, 2010, the date on which the  
3 defendants' counsel acknowledged the amount of the debt to be the  
4 amount this court ultimately determined is due, was the date on  
5 which the amount of Zurich's damages was certain or readily  
6 calculable by the defendants; pre-judgment interest will run from  
7 that date.

8 For the reasons stated, the court overrules the Objection.  
9 except as to the date of accrual of pre-judgment interest. The  
10 court will issue an appropriate order and judgment.

11 Dated: Feb. 11, 2013

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13 ROBERT S. BARDWIL  
14 United States Bankruptcy Judge  
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